United States Court of Appeals

for the Second Circuit

APPENDIX

74-1302

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

CARLOS IVAN SANDOVAL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

DONALD L. DOERNBERG
JEREMIAH S. GUTMAN
Levy, Gutman, Goldberg
& Kaplan
363 Seventh Avenue
New York, New York 10001
(212) 736-2226
Attorneys for Defendant-Appellant

PAGINATION AS IN ORIGINAL COPY

Table of Contents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA,

Appellee,

-against-

CARLOS IVAN SANDOVAL,
Defendant-Appellant.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

71 Cr. 1314 (JRB)

- -x

INDEX TO THE RECORD ON APPEAL

Documents

40
69403

71 CR 1314

DEC 17 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

Cr. No.
(50 USC App., 3462(a))

CARLOS IVAN SANDOVAL,

Defendant.

- X

THE GRAND JURY CHARGES:

On or about and between the 18th day of April 1968, and the date of filing of this indictment, within the Eastern District of New York, the defendant CARLOS IVAN SANDOVAL, a person registered pursuant to the Universal Military Training and Service Act, as amended, the Proclamations of the President of the United States, and the Regulations issued and promulgated pursuant to said Act, knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to report for induction, within the Eastern District of New York, after notice had been given to the defendant by Local Board No. 51, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 18th day of April 1968. (Title 50 U.S.C. App., 3462(a).)

A TRUE BILL.

FOREMAN.

ROBERT A. MORSE
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- :

71-CR-1314

CARLOS IVAN SANDOVAL, :

Defendant. :

----------x

Appearances:

HON. ROBERT A. MORSE
United States Attorney
Eastern District of New York
THOMAS R. MAHER, ESQ.
Assistant U.S. Attorney
Of Counsel

DONALD L. DOERNBERG, ESQ.
JEREMIAH S. GUTMAN, ESQ.
Levy, Gutman, Goldberg & Kaplan
Attorneys for Defendant
363 Seventh Avenue
New York, N.Y. 10001

BARTELS, D.J.

Defendant, a twenty-three year old registrant of Local Board No. 51, Brooklyn, New York, duly registered with that Board in June, 1966, and reported for an armed forces physical examination on July 24, 1967. He was found fully qualified for induction and on March 11, 1968 was ordered to report for induction on March 26, 1968. The reporting date

was postponed until April 18, 1968, at which time defendant failed to report for induction. On December 17, 1971, defendant was indicted for failing to report for induction in violation of 50 U.S.C.A. App. §462(a). He pleaded not guilty to the indictment and consented to be tried by the Court without a jury.

By his plea, he placed in issue every material element in the indictment. At the trial he asserted the essence of his defense to the effect that his induction order violated due process because he was ordered out of sequence, in violation of the order of call requirement of the Selective Service Act. After the trial Sandoval moved to dismiss the indictment on the ground that the Government failed to establish a prima facie case, and at the same time he moved, pursuant to F.R.Crim.P. Rule 29, for a judgment of acquittal alleging that the Government failed to prove its case beyond a reasonable doubt. Decision was reserved to permit the parties to submit post-trial memoranda based on the evidence adduced at trial.

On the basis of evidence introduced by the Government and uncontradicted by the defendant, the Court finds beyond reasonable doubt that on March 11, 1968, the defendant was

issued a valid order to report for induction on March 26, 1968; that he knowingly failed to do so on that date or any date thereafter, in violation of the continuous obligation imposed upon him by 32 C.F.R. §1632.14 and 50 U.S.C. §454(a); that the order of call requirement was not violated and that the order to report for induction was in all respects valid.

In a case of this kind we are not without guidelines. The Court of Appeals for this Circuit stated in United States v. Strayhorn, 471 F.2d 661,664 (2d Cir.1972), that when the order of call defense is asserted, defendant must show that:

> "there existed enough available 1A's with higher priorities for call than his, whose inclusion on a monthly list would have 'bumped' him off. In response, the government need not engage in extended review of the attacked bypasses, but can normally satisfy its burden through documentary evidence and testimony of a local board clerk."

and further, as noted in United States v. Weintraub, 429 F.2d 658,660 (2d Cir.1970), cert. denied, 400 U.S. 1014 (1971), citing cases, that in order to receive the benefit of the order of call defense, the defendant must show an apparent departure from the proper order of call before the burden is shifted, and:

> "To meet this strict demand in an attack on another's classification, deferment or postponement of call a defendant needs to show action by the board so lacking in support in the record as to be arbitrary and capricious."

As stated in Strayhorn, at p. 663:

> "not every minor slip-up represents such an affront to the priority rules and notions of due process as to require the rather drastic sanction of reversing a criminal conviction for failure to submit to induction."

The defendant initially asserted that sixty-three registrants, all older than he, were improperly bypassed in calling him for induction in the March 26, 1968 call. He relied upon evidence obtained from the Selective Service files of the registrants claimed to have higher priorities insofar as those files still existed, and from the Classification Record Register, SS Form 102 ("the 102 Register"), in cases where the files were no longer in existence. The parties stipulated that for the order of call defense to be successful, the defendant must demonstrate that at least twenty-four (24) of the sixty-three (63) were improperly passed over, since if fewer than that number were improperly bypassed, defendant would have been reached in the March 28 call at all events.

To maintain statutory confidentiality, the files of the sixty-three challenged registrants were referred to throughout the proceedings by numbers and letters assigned to each of them on a worksheet prepared by the parties prior to trial. Bypassed registrants whose individual files were no longer in existence were assigned numbers "1" through "43." Bypassed registrants whose files were still in existence and introduced into evidence were assigned letters "A" through "T." One of the contentions of the defendant is that the Government is unable to prove its case against him because the files have been destroyed. However, Assistant United States Attorney Maher stated without contradiction at trial, and the Court so finds, that these files were destroyed pursuant to a standing order of the Director of Selective Service to the effect that no files were to be retained on registrants who had passed the age of twenty-six. There is no evidence that the Local Board destroyed the files in reckless disregard of this or any other pending litigation. In the absence of any evidence to the contrary, we must assume that the Local Board performed its duty predicated upon the legal presumption of regularity which attaches to such official proceedings. Similar routine destruction of files

pursuant to a standing order has been upheld in United States v. Hall, 449 F.2d 1206 (5th Cir.1971), cert. denied, 405 U.S. 957 (1972); see also United States v. Strayhorn, 471 F.2d at 666. Since production of the files was impossible, we may accept oral testimony concerning the specific reasons for bypassing these registrants. United States v. Strayhorn, supra, at 666.

As indicated below, on the basis of all the evidence before us, we find that the Government has proven beyond a reasonable doubt that at least fifty-three of the challenged registrants were not improperly bypassed, and that only ten could possibly have been improperly bypassed. Whether or not the defendant has even met his initial burden of showing an apparent departure from the proper order of call with regard to any of the challenged registrants, as required by United States v. Strayhorn, supra, and United States v. DeGraffenreid, 471 F.2d 23 (2d Cir.1972), cert. denied, 411 U.S. 984 (1973), it is clear that the Government has proven beyond a reasonable doubt that the defendant has not been prejudiced by any arbitrary and capricious action of the Local Board.

At the outset, it should be noted that during the trial, the defendant withdrew his claim that registrants 3,

23, 25, 28 and 39 were improperly bypassed. We turn now to a detailed examination of the remaining registrants with higher priorities whom the defendant claims were improperly bypassed and the reasons why they were not called in sequence. We find beyond a reasonable doubt that the registrants in the following categories were not improperly bypassed:

Registrants 1, 2, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 24, 26, 29 and 31.

Since the files of the above registrants were not available, the Court must rely on public Register 102 and the testimony of Mrs. Gloria Cooper, chief clerk of Local Board 51. The 102 Register lists these seventeen registrants as "Group 4" or "Gp 4." Mrs. Cooper testified that she and the clerks under her supervision kept the minutes of the board on the back of each registrant's questionnaire, and made notations of "Group 4" or "Gp 4" in the 102 Register the day after board meetings based on those minutes when a married registrant was found to have been married prior to August, 1965. According to Mrs. Cooper's testimony, which is accepted by the Court, these entries were made prior to March, 1968. The Court finds that all of the registrants mentioned above were in Group 4, since they were married

prior to August, 1965, and were therefore in a lower priority classification than the defendant's group, which was Group 3. Under 32 C.F.R. §1631.7,[1/] in effect at the time, these Group 4 registrants could not have been called prior to the defendant. See United States v. Weintraub, 429 F.2d at 662, n.4.

Registrants A, B, C, E, F, H, J, L, N and T.

These registrants were bypassed because they were New Mental Standards ("NMS") cases. The defendant and the Government have stipulated that the individual Selective Service files so indicate. Defendant argues that the NMS categorization is unauthorized by statute or regulation and that these ten registrants should have preceded defendant in the call. However, in United States v. Weintraub, 429 F.2d at 660-1, n.2, the Court of Appeals for this Circuit held

---

1/ 32 C.F.R. §1631.7, in effect at the time, classifies registrants into groups according to selection priorities as follows: Group 1 - delinquents; Group 2 - volunteers; Group 3 - other registrants between the ages of 19 and 26 who were acceptable for military service, and who either were not presently married or not married prior to August, 1965; Group 4 - same as Group 3 except that these registrants were married prior to August, 1965, and were still married; Group 5 - acceptable registrants over 26 years old.

that the special treatment of New Mental Standards registrants was proper:

> "We conclude that the special treatment of New Mental Standards registrants was proper under the applicable Selective Service Regulations. The Director of Selective Service is empowered, at any report for induction, to postpone 'for a time prior to the issuance of orders to good cause' the issuance of an induction order 'until such time as he may deem advisable.' 32 C.F.R. §1632.2(a)(1970). There is no restriction of this power to individual registrants; thus, the Director, pursuant to this section, can postpone the induction of a class of registrants if he has good cause for doing so. The reasons for assimilating New Mental Standards registrants into the Army at a slower rate than if they were incorporated en masse into the pool of registrants available for service are obvious. It was deemed undesirable to have any substantial numbers of these New Mental Standards registrants inducted into the Armed Forces at one time."

Therefore, the Court finds that the bypassing of the above ten registrants was proper.

Registrants 32, 33, 34, 38, D, G, I, K, M, O, P, Q, R and S.

The above fourteen registrants were also bypassed because they were NMS cases. The 102 Register listed them as "NMS," but the files of four of them (32, 33, 34 and 38) had been destroyed pursuant to the standing order of the Director, and the files of the other ten (D, G, I, K, M, O,

P, Q, R and S) provided no information on this point. However, there is no question that the NMS entry represents the last physical examination notation preceding March 11, 1968 in the 102 Register. Mrs. Cooper testified that it was her practice to make an entry of "NMS" when a previously mentally unqualified registrant became qualified under the New Mental Standards regulations. Other clerks under her supervision used the "XYX" symbol for NMS cases as explained in the next category. We find from the testimony and evidence that the above registrants were in fact New Mental Standards cases and, based upon United States v. Weintraub, supra, that they were properly bypassed.

Registrants 27, 35, 36, 37, 40, 42 and 43.

The above registrants were also bypassed because they were NMS cases. The parties agree that these seven registrants were originally found physically qualified but mentally unqualified. Mrs. Cooper testified that from the symbols "XYX" in the 102 Register and from the dates of the examinations of these registrants, she could tell that these were NMS cases. Her conclusions were based on the regular business practice of the local board that when a registrant

met the physical standards ("X"), failed to meet the mental standards ("Y") and passed the moral standards ("X"), "XYX" was entered after his name in the 102 Register. All XYX cases were reviewed by the local board shortly after the adoption of the New Mental Standards in December, 1966. Since the 102 Register carried a notation in each case that the registrant was found acceptable within a few months of December, 1966 standards, the Court accepts Mrs. Cooper's testimony and finds that these registrants were in fact New Mental Standards cases, and were properly bypassed, United States v. Weintraub, supra.

Conclusion

The parties stipulated that in order for the defendant's order of call defense to succeed, he must show that at least twenty-four of the sixty-three registrants he challenged were bypassed improperly. We find that the Government has proven beyond a reasonable doubt that at least fifty-three of the sixty-three challenged registrants were not arbitrarily or capriciously passed over. Even without determining the propriety of the bypassing of the other ten registrants (4, 5, 6, 12, 14, 20, 21, 22, 30 and

41), it is clear that the order of call defense must fail. United States v. Strayhorn, supra; United States v. DeGraffenreid, supra.

Therefore, defendant's motions to dismiss the indictment and for a judgment of acquittal must be, and hereby are, denied, and he is hereby found guilty of violating 50 U.S.C.A. App. §462(a). SO ORDERED.

Dated: Brooklyn, N.Y.,
October 26, 1973.

Edward R. Bartels
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

- against - :

CARLOS IVAN SANDOVAL, :

Defendant. :

- -x

71-CR-1314

NOTICE OF APPEAL

S I R S:

Notice is hereby given that CARLOS IVAN SANDOVAL, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment of conviction entered herein on February 8, 1974, and from each and every part thereof.

Dated: New York, N.Y.
February 27, 1974.

Yours, etc.

DONALD L. DOERNBERG
JEREMIAH S. GUTMAN
LEVY, GUTMAN, GOLDBERG & KAPLAN
363 Seventh Avenue
New York, N.Y. 10001
212 - 736-2226

Attorneys for Defendant.

To: THOMAS R. MAHER, ESQ.
Asst. United States Attorney
for the Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

CERTIFICATE OF SERVICE

The Undersigned, a member of the bar of this Court, hereby certifies that on the 12th day of April, 1974, he served one copy of the within appendix upon Thomas R. Maher, Esquire, Assistant United States Attorney, by proper mail service.

Dated: New York, New York
April 12, 1974

Donald L. Doernberg

DONALD L. DOERNBERG